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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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12 TAREK F.,
13 Plaintiff,
14 v.
15 KILOLO KIJAKAZI, Acting
16 Commissioner of Social Security,
17 Defendant.

Case No. 5:22-cv-894-GJS

**MEMORANDUM OPINION AND
ORDER**

18 **I. PROCEDURAL HISTORY**

19 Plaintiff Tarek F.¹ filed a Complaint seeking review of the decision of the
20 Commissioner of Social Security denying his applications for a period of disability
21 and Disability Insurance Benefits (“DIB”) and Supplemental Security Income
22 (“SSI”) payments. The parties filed consents to proceed before a United States
23 Magistrate Judge (ECF Nos. 12, 13) and briefs (ECF Nos. 19 (“Pl.’s Br.”), and 22
24 (“Def.’s Br.”)), addressing the disputed issue in the case. The matter is now ready
25 for decision. For the reasons set forth below, the Court finds that this matter should
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28 ¹ In the interest of privacy, this Order uses only the first name and last initial of
the non-governmental party in this case.

1 be remanded for further proceedings.

3 II. ADMINISTRATIVE DECISION UNDER REVIEW

4 Plaintiff filed an application for a period of disability and DIB on March 16,
5 2020, and an application for SSI on March 13, 2020, alleging disability commencing
6 on February 14, 2020. (ECF No. 16, Administrative Record (“AR”) 15; *see also* AR
7 187, 189.) Plaintiff’s applications were denied at the initial level of review and on
8 reconsideration. (AR 15, 77, 78, 97, 98.) A telephonic hearing was held before
9 Administrative Law Judge Jeannine Lesperance (“the ALJ”) on February 10, 2021.
10 (AR 15, 28-58.)

11 On May 13, 2021, the ALJ issued an unfavorable decision applying the five-
12 step sequential evaluation process for assessing disability. (AR 15-23); *see* 20
13 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1). At step one, the ALJ determined
14 that Plaintiff has not engaged in substantial gainful activity since the alleged onset
15 date. (AR 17.) At step two, the ALJ determined that Plaintiff has the severe
16 impairment of myotonic dystrophy type I.² (AR 17.) At step three, the ALJ
17 determined that Plaintiff does not have an impairment or combination of impairments
18 that meets or medically equals the severity of one of the impairments listed in
19 Appendix 1 of the Regulations. (AR 18); *see* 20 C.F.R. pt. 404, subpt. P, app. 1.
20 The ALJ found that Plaintiff has the residual functional capacity (“RFC”) to perform
21 sedentary work, as defined in 20 C.F.R. §§ 404.1567(a), 416.967(a), except as
22 follows:

23 [H]e can occasionally climb ramps and stairs, balance, stoop, kneel,
24 crouch, or crawl; occasionally push, pull or operate . . . foot controls
bilaterally; and never climb ladders, ropes or scaffolds or work at

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26 ² Plaintiff describes this as “a multisystem disorder that affects skeletal and
27 smooth muscle as well as the eye, heart, endocrine system, and central nervous
28 system.” (Pl.’s Br. 5 n.2 (citing <https://www.ncbi.nlm.nih.gov/books/NBK1165>).) It
is characterized by progressive muscle wasting and weakness.
<https://medlineplus.gov> (last visited March 27, 2023).

1 unprotected heights.

2 (AR 18.) At step four, the ALJ determined that Plaintiff is not able to perform his
3 past relevant work in the composite job of translator and teacher aide I, and in the
4 jobs of retail sales clerk, department manager, and cashier/checker. (AR 21, 53-54.)
5 At step five, based on the testimony of the vocational expert (“VE”), the ALJ found
6 that Plaintiff could perform other jobs existing in significant numbers in the national
7 economy, including representative jobs such as a sealer, a telephone quote clerk, and
8 an electronic assembler. (AR 22-23.) Based on these findings, the ALJ found
9 Plaintiff not disabled through the date of the decision. (AR 23.)

10 The Appeals Council denied review of the ALJ’s decision on March 28, 2022.
11 (AR 1-5.) This action followed.

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13 **III. GOVERNING STANDARD**

14 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
15 determine if: (1) the Commissioner’s findings are supported by substantial evidence;
16 and (2) the Commissioner used correct legal standards. *See le v. Comm’r Soc. Sec.*
17 *Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm’r Soc. Sec. Admin.*,
18 682 F.3d 1157, 1161 (9th Cir. 2012). “Substantial evidence . . . is ‘more than a mere
19 scintilla.’ It means -- and only means -- ‘such relevant evidence as a reasonable
20 mind might accept as adequate to support a conclusion.’” *Biestek v. Berryhill*, 139 S.
21 Ct. 1148, 1154 (2019) (citations omitted); *Gutierrez v. Comm’r of Soc. Sec.*, 740
22 F.3d 519, 522-23 (9th Cir. 2014) (internal quotation marks and citation omitted).

23 The Court will uphold the Commissioner’s decision when “the evidence is
24 susceptible to more than one rational interpretation.” *See Molina v. Astrue*, 674 F.3d
25 1104, 1110 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
26 404.1502(a). However, the Court may review only the reasons stated by the ALJ in
27 his decision “and may not affirm the ALJ on a ground upon which he did not rely.”

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1 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not reverse the
 2 Commissioner’s decision if it is based on harmless error, which exists if the error is
 3 “inconsequential to the ultimate nondisability determination, or if despite the legal
 4 error, the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*, 806
 5 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations omitted).

7 IV. DISCUSSION

8 Plaintiff raises the following issue challenging the ALJ’s findings and
 9 determination of non-disability: the ALJ failed to properly evaluate Plaintiff’s
 10 subjective symptom testimony. (Pl.’s Br. 5.) As discussed below, the Court agrees
 11 with Plaintiff and finds that remand is appropriate.

13 A. LEGAL STANDARD

14 In evaluating a claimant’s subjective symptom testimony, an ALJ must engage
 15 in a two-step analysis. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
 16 2007); 20 C.F.R. § 404.1529(c). First, the ALJ must determine whether the claimant
 17 has presented objective medical evidence of an underlying impairment which “could
 18 reasonably be expected to produce the pain or other symptoms alleged.”
 19 *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th
 20 Cir. 1991) (en banc)). Second, if the claimant meets the first step and there is no
 21 evidence of malingering, “the ALJ can reject the claimant’s testimony about the
 22 severity of her symptoms only by offering specific, clear and convincing reasons for
 23 doing so.” *Id.* at 1036 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)
 24 (internal quotation marks omitted)). At the same time, the “ALJ is not required to
 25 believe every allegation of disabling pain, or else disability benefits would be
 26 available for the asking, a result plainly contrary to the Social Security Act.” *Smartt*
 27 *v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022) (citation and internal quotation marks
 28

omitted).

B. ANALYSIS

In the present case, the ALJ discounted Plaintiff's subjective complaints as follows:

After careful consideration of the evidence, I find that [Plaintiff's] medically determinable impairment could reasonably be expected to cause at least some of the alleged symptoms; however, [his] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this decision. [¶] [Plaintiff's] statements about the alleged intensity, persistence, and limiting effects of symptoms are inconsistent with the medical evidence of record. [He] alleged that muscle weakness with difficulty lifting, standing, walking, and sitting reduced his ability to perform work-related activities. The alleged intensity, persistence, and limiting effects of these symptoms, however, are inconsistent with the evidence in the case record, as further discussed below. Accordingly, the medical evidence of record does not support the level of symptomology that [Plaintiff] alleged and is inconsistent with [his] statements concerning the alleged intensity, persistence, and limiting effects of symptoms. [¶] [Plaintiff's] statements concerning the alleged intensity, persistence, and limiting effects of [his] symptoms on the ability to ambulate are inconsistent with the objective medical evidence and the other evidence of record.

(AR 19.) The ALJ then summarized a number of Plaintiff's medical records, discussed her consideration of the persuasibility and consistency of the administrative findings at initial review and on reconsideration, and noted her RFC findings relating to Plaintiff's limitations. (AR 20.) She concluded as follows:

In sum, the above residual functional capacity assessment in this finding is based on all of the relevant evidence in the record. The relevant medical evidence and other evidence in the case record only partially support [Plaintiff's] statements regarding the alleged intensity, persistence, and limiting effects of symptoms.

(AR 20.)

Plaintiff generally contends that "[b]eyond a discussion of the objective medical evidence, it does not appear that the ALJ actually offered any rationale to reject [Plaintiff's] testimony." (Pl.'s Br. 9 (citations omitted).) He points out that the

ALJ also failed to connect any of Plaintiff's testimony to the parts of the record supporting her decision thereby preventing the Court from determining whether the decision was supported by substantial evidence. (Pl.'s Br. 9 (citations omitted).) He further contends that the ALJ's conclusory statement, without explanation, regarding the lack of consistency between Plaintiff's testimony and the "other evidence" also is not legally sufficient as it is too vague to permit the Court to conclude the ALJ did not arbitrarily discredit his testimony. (Pl.'s Br. 10 (citations omitted).)

Plaintiff argues that, in any event, the ALJ's discussion of the objective medical evidence supports Plaintiff's testimony. (Pl.'s Br. 11.) For instance, as the ALJ noted, Plaintiff has symptoms including moderate right foot drop; mild left foot drop; "mild persistent non-fatigable ptosis [drooping upper eyelid], moderate weakness with eye closure bilaterally, unable to bury eyelids, positive for air leak with cheek puff"; sensory motor testing at 2/5 for right knee extension, 2/5 bilaterally for ankle dorsiflexion, and 3/5 "extensor hallicus longus" on right; positive percussion myotonia of the thenar eminences (located on the radial portion of the hand at the base of the thumb); and progressive weakness in the hand and knee extensors.³ (Pl.'s Br. 11 (citing AR 20, 302).)

Defendant responds that "the ALJ reasonably found that Plaintiff's testimony of greater limitations was not entirely consistent with the medical evidence and other evidence," and "identified several inconsistencies in the record that supported this conclusion." (Def's. Br. 6.) For instance, Defendant notes the following: (1) the ALJ found Plaintiff's allegations regarding difficulties walking, balance problems,

³ Although Plaintiff notes that the ALJ did *not* articulate Plaintiff's "sporadic daily activities as reason to reject his testimony," he nevertheless discusses why those activities fail to demonstrate that he is capable of maintaining substantial gainful work activity. (Pl.'s Br. 12-13.) Because this was *not* a reason articulated by the ALJ for discounting Plaintiff's testimony, the Court declines to consider it. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) ("We are constrained to review the reasons the ALJ asserts.").

1 fatigue, and need for an assistive device to be inconsistent with provider reports that
 2 he had a normal gait and was active; (2) the objective clinical findings reflecting
 3 Plaintiff's strength as 2 out of 5 on right knee extension and ankle dorsiflexion on
 4 one examination, was inconsistent with other records showing "only mildly reduced
 5 strength,"⁴ and "no more than moderate or mild foot drop"; and (3) the medical
 6 evidence of record was minimal. (Def's. Br. 6 (citing AR 18, 19-20, 296, 298, 301-
 7 02, 305).) Defendant suggests that despite the "meager evidence, the ALJ did not
 8 entirely reject Plaintiff's symptom allegations," and limited him to sedentary work
 9 with a number of limitations. (Def's. Br. 7-8.)

10 The ALJ's reasons for discounting Plaintiff's testimony as described by
 11 Defendant serve only to emphasize the fact that the ALJ relied *solely* on the medical
 12 evidence of record to discount that testimony. In fact, the ALJ simply restated her
 13 position -- that either Plaintiff's testimony was inconsistent and unsupported by the
 14 medical record, or that the medical record failed to support Plaintiff's testimony -- no
 15 fewer than six times, generally without tying his testimony to the record evidence.
 16 Beyond that, the ALJ provided no other legally sufficient reason to discount
 17 Plaintiff's subjective symptom testimony.

18 Even assuming the ALJ's reasons for discounting Plaintiff's testimony based
 19 on their inconsistency with the medical evidence of evidence were specific, clear,
 20 and convincing, and supported by substantial evidence -- which the Court does not
 21 decide -- the lack of supporting medical evidence cannot "form the sole basis for
 22 discounting . . . testimony." *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
 23 2005); *Bunnell*, 947 F.2d at 345 ("[O]nce the claimant produces objective medical
 24 evidence of an underlying impairment, an [ALJ] may not reject a claimant's
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26 ⁴ The ALJ specifically acknowledged, however, that the later examiner "noted
 27 that [Plaintiff's] weakness had progressed since he was last seen." (AR 20.) Indeed,
 28 as previously noted, myotonic dystrophy is characterized by progressive muscle
 wasting and weakness. <https://medlineplus.gov> (last visited March 27, 2023).

1 subjective complaints based solely on a lack of objective medical evidence to fully
2 corroborate the alleged severity” of his impairment).

3 Where, as here, the ALJ fails to state legally sufficient reasons for discounting
4 a claimant’s subjective complaints, a court ordinarily cannot properly affirm the
5 administrative decision. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 884-85 (9th
6 Cir. 2006). The Court is unable to conclude that the ALJ’s errors in evaluating
7 Plaintiff’s subjective complaints were “harmless” or “inconsequential to the ultimate
8 non-disability determination.” *Brown-Hunter*, 806 F.3d at 492.

9 Remand is warranted on this issue.

10 11 V. REMAND FOR FURTHER PROCEEDINGS

12 As the circumstances of this case suggest that further administrative
13 proceedings could remedy the ALJ’s errors, remand is appropriate. *See Dominguez*
14 *v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court concludes that
15 further administrative proceedings would serve no useful purpose, it may not remand
16 with a direction to provide benefits.”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775
17 F.3d 1090, 1101, n.5 (9th Cir. 2014) (remand for further administrative proceedings
18 is the proper remedy “in all but the rarest cases”); *Harman v. Apfel*, 211 F.3d 1172,
19 1180-81 (9th Cir. 2000) (remand for further proceedings rather than for the
20 immediate payment of benefits is appropriate where there are “sufficient unanswered
21 questions in the record”).

22 23 VI. CONCLUSION

24 For all the foregoing reasons, **IT IS ORDERED** that:

25 (1) the decision of the Commissioner is **REVERSED** and this matter

26 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further
27 administrative proceedings consistent with this Memorandum Opinion and
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1 Order; and
2 (2) Judgment be entered in favor of Plaintiff.
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4 **IT IS SO ORDERED.**
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6 DATED: March 27, 2023
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8
9 GAIL J. STANDISH
10 UNITED STATES MAGISTRATE JUDGE
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